

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

CHARLES E. COOK,

Plaintiff,

v.

**JOHN MCHUGH¹, Secretary of the
United States Department of the Army,**

Defendant.

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Case No. 3:09-0649

Judge Nixon

Magistrate Judge Bryant

JURY DEMAND

ORDER

Pending before the Court are Defendant Secretary of the Army's ("Defendant") Motion to Dismiss, or Alternatively, for Summary Judgment ("Defendant's Motion") (Doc. No. 14), Memorandum in Support (Doc. No. 15), and Statement of Facts (Doc. No. 16). Plaintiff Charles Cook ("Plaintiff") filed a Response in Opposition to Defendant's Motion ("Plaintiff's Response") (Doc. No. 21) and a Response to Defendant's Statement of Facts (Doc. No. 22). Also pending before the Court is Defendant's Motion for Leave to File Reply Memorandum (Doc. No. 23) and Plaintiff's Motion to File Late-Filed Exhibit to Plaintiff's Response in Opposition (Doc. No. 24). Defendant filed a Response in Opposition to Plaintiff's Motion to File Late-Filed Exhibit. (Doc. No. 25.)

For the following reasons, Defendant's Motion is **GRANTED in part** and **DENIED in part**. In addition, Defendant's Motion is **CONVERTED to a motion for summary judgment** and additional briefing is **ORDERED**. Defendant's Motion for Leave to File Reply and Plaintiff's Motion to File Late-Filed Exhibit are **GRANTED**.

¹ John McHugh has succeeded Pete Geren as Secretary of the United States Army. Therefore, he is automatically substituted as a party pursuant to Federal Rule of Civil Procedure 25(d)(1).

I. 12(b)(1) MOTION TO DISMISS

In his Response, Plaintiff concedes his claim under the Tennessee Human Rights Act and Tennessee common law, as well as his demand for punitive damages. (Doc. No. 21, at 1.) Accordingly, Defendant's Motion to Dismiss under 12(b)(1) is **GRANTED** with regard to Count Three of the Complaint; the claim is **DISMISSED**, and Plaintiff's demand for punitive damages is **STRUCK**.

II. 12(b)(6) MOTION TO DISMISS OR ALTERNATIVELY SUMMARY JUDGMENT

The Court finds that Defendant's Motion is properly considered as a motion for summary judgment. With the filing of its Supporting Memorandum, Defendant introduced matters outside the pleadings. Per Federal Rule of Civil Procedure 12(d), if on a Rule 12(b)(6) motion to dismiss, "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). Additionally, Defendant filed its Motion prior to the close of discovery. Plaintiff's Response avers that moving for summary judgment was premature and responds specifically to the Motion to Dismiss portion of Defendant's Motion. (Doc. No. 21, at 1.)

It is within the sound discretion of the trial court to determine when conversion and additional briefing may be appropriate. See Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 1366 (3d ed. 2008) ("As the language of the rule suggests, federal courts have complete discretion to determine whether or not to accept the submission of any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion."). The Court will consider Defendant's Motion under summary judgment and allow Plaintiff to submit supplemental briefing and evidence for the Court to consider. The

Court hereby **CONVERTS** Defendants' Motion into a motion for summary judgment.


Accordingly, the Court **ORDERS** the parties to submit any supplemental briefing, supporting evidence, and other material which may be pertinent to disposition of this Motion on or before **thirty (30) days** from the entry of this Order. Because Plaintiff will be able to file his affidavit during the period of supplemental briefing, his Motion to File Late-Filed Exhibit is **GRANTED**.

III. CONCLUSION

Therefore, Defendants' Motion is **GRANTED in part** and **DENIED in part**. In addition, Defendants' Motion is **CONVERTED to a motion for summary judgment** and additional briefing is **ORDERED**. Defendant's Motion for Leave to File Reply and Plaintiff's Motion to File Late-Filed Exhibit are **GRANTED**.

It is so ORDERED.

Entered this the 15th day of July, 2010.



JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT